80-942

No. .....

Supreme Court, U. S.
FILED
DEC 9 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

In Re

JOHN M. SHAHEEN,

Petitioner below,

—against—

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK (HONORABLE RICHARD OWEN, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK),

Respondent below.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MICHAEL ROSEN,
Counsel of Record

SAXE, BACON & BOLAN, P.C.
Attorneys for Petitioner,
John M. Shaheen
39 East 68th Street
New York, N. Y. 10021
(212) 472-1400

THOMAS A. ANDREWS
HOWARD F. HUSUM
FILIP L. TIFFENBERG

Of Counsel

QUESTIONS PRESENTED

1. Whether the Federal District Court for the Southern District of New York exceeded its jurisdictional powers and violated petitioner's basic constitutional due process rights in denying petitioner's motion to dismiss the proceedings below on the ground that his adversary had failed to state a claim upon which relief could be granted and in permitting his adversary to proceed against him to trial on the basis of a jurisdictionally defective pleading?

2. Whether the Court of Appeals for the Second Circuit erred in declining to issue a Writ of Mandamus directing the District Court to dismiss the subject jurisdictionally defective pleading?

THE PARTIES BELOW

The parties to the Mandamus proceeding before the Court of Appeals of the Second Circuit were:

1. John M. Shaheen, the party seeking the Writ of Mandamus;

2. The United States District Court, Southern District of New York (Honorable Richard Owen, United States District Judge for the Southern District of New York);

3. The Clarkson Company Limited, the judgment creditor which had instituted a supplementary proceeding in the District Court against Shaheen, the judgment debtor, and one Martin Rubin;

4. Martin Rubin, escrowee of the collateral sought by Clarkson Company Limited in said supplementary proceeding; and

5. Macmillan Ring Free Oil

Company, Inc., a claimant to said collateral, which intervened in the Mandamus proceeding.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
THE PARTIES BELOW	ii
TABLE OF AUTHORITIES	vi
NATURE OF PETITION	1
OPINIONS BELOW	3
JURISDICTION	3
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	3
STATEMENT OF THE CASE	5
A. THE STATUTORY BASIS FOR THE SUPPLEMENTARY PROCEEDING	8
B. THE ALLEGATIONS OF CLARKSON'S PETITION	9
C. PETITIONER'S MOTION BELOW TO DISMISS THE PETITION FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED	10
D. THE DISTRICT COURT'S DISPOSITION OF THE MOTION	11
E. PETITIONER'S WRIT OF MANDAMUS TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT	14
REASONS FOR GRANTING THE WRIT	15

ARGUMENT Page

I. THE DISTRICT COURT HAS REFUSED TO ABIDE BY WELL SETTLED PRINCIPLES OF LAW 17

II. THE SECOND CIRCUIT ERRED IN FAILING TO ISSUE A WRIT OF MANDAMUS 22

III. MANDAMUS WAS REQUIRED BELOW BECAUSE THERE EXISTS NO OTHER MEANS TO PREVENT POSSIBLE IRREPARABLE INJURY 24

CONCLUSION 26

APPENDIX

A. THE TEXT OF CPLR §5225(b) 1a

B. CLARKSON'S PETITION, ORDER TO SHOW CAUSE AND SUPPORTING AFFIDAVIT 4a

C. PETITIONER'S NOVEMBER 14, 1980 LETTER TO THE DISTRICT COURT AND THE DISTRICT COURT'S MEMORANDUM OPINION 32a

TABLE OF AUTHORITIES

CASES CITED	Page
American Airlines v. Forman, 204 F.2d 230, 232 (3rd Cir. 1953)	23
Cohen v. First National, 49 Misc. 2d 141, 267 N.Y.S.2d 146 (Civil Ct., N.Y.Co. 1966)	19
Ex Parte Peru, 318 U.S. 578 (1943)	24
Leumi Finance Corp. v. Sydler, 60 Misc.2d 1021, 304 N.Y.S.2d 988 (Sup.Ct. Nassau Co. 1969)	19
Roche v. Evaporated Milk, 319 U.S. 21, 26 (1942)	22-23
CONSTITUTIONAL PROVISIONS AND STATUTES CITED	
Constitution of United States, Amendment 14, Section 1	3
New York CPLR 5225(b)	1a
28 U.S.C. 1651	22

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No.

In Re

JOHN M. SHAHEEN,

Petitioner below,

-against-

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK (HONORABLE RICHARD OWEN, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK),

Respondent below,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, John M. Shaheen, respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit entered on December 4, 1980.

In said decision, the Second Circuit dismissed Shaheen's Petition for a Writ of Mandamus directing the District Court, Southern District of New York, to dismiss a supplementary proceeding instituted by The Clarkson Company Limited, as judgment creditor, against, inter alia, John M. Shaheen, as judgment debtor, on the ground that said proceeding was predicated upon a jurisdictionally defective pleading or petition.

OPINION BELOW

There was no opinion issued by the Second Circuit. The memorandum opinion of the District Court appears in Appendix C, infra.

JURISDICTION

The decision of the Court of Appeals was entered December 4, 1980. This petition was timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 1651.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOKED

1. Constitution of the United States, Amendment XIV, §1...nor shall any state deprive any person of life, liberty or property without due

process of law...

2. New York Civil Practice Law and Rules Section 5225(b) appears in Appendix "A", infra.

STATEMENT OF THE CASE

The facts and circumstances from which this controversy arises are not in dispute.

By order to show cause, petition and supporting papers dated October 2, 1980, The Clarkson Company Limited ("Clarkson") instituted a supplementary proceeding in the United States District Court for the Southern District of New York (Richard Owen, J.), pursuant to Federal Rule of Civil Procedure 69 (a) and New York State Civil Practice Laws and Rules5225(b) ("CPLR 5225(b)"), in aid of the enforcement of a federal money judgment entered on its behalf in a civil

action on July 22, 1980*.

Pursuant to said proceeding, Clarkson sought an order requiring petitioner herein, John M. Shaheen ("petitioner" or "Shaheen"), to turn over to Clarkson certain stock which petitioner owns but which, in March 1977, more than three years previously, petitioner had pledged to a third party, Macmillan Ring Free Oil Company, Inc. ("MRFO"), to secure the repayment of a debt ("Pledged Stock"). The Pledged Stock, at the time Clarkson commenced its supplementary proceeding and at present, is held in a purely custodial and non-proprietary capacity by a third

---

* The subject supplementary proceeding is governed by the state law of New York pursuant to F.R.C.P. 69(a). Clarkson's claim of federal jurisdiction was based upon diversity of citizenship and ancillary jurisdiction.

party escrowee, Martin Rubin, Esq. ("escrowee"), pursuant to the terms of the subject pledge.

At the time Clarkson instituted the subject supplementary proceeding, it was fully aware of the subject pledge and of the fact that Martin Rubin, escrowee, held the Pledged Stock in a purely custodial capacity on behalf of MRFO, the pledgee.

However, despite its knowledge of the underlying pledge, Clarkson failed to name the pledgee, MRFO, as a party in the subject proceeding. It chose to seek relief only against petitioner, who holds legal title to the Pledged Stock, and Rubin, the nominal escrowee of the Pledged Stock.

A. The Statutory Basis for the Supplementary Proceeding

CPLR 5225(b), the statute upon which the subject proceeding is predicated, provides in relevant part that a judgment creditor (here Clarkson) may procure property in the hands of a third party in which its judgment debtor (here Shaheen) has an interest only if:

> "it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee."*

The "transferee" in the case at bar, for purposes of CPLR 5225(b), is Macmillan Ring-Free Oil Company, Inc. to whom the subject stock was pledged to secure the repayment of a debt. Martin Rubin, the escrowee pursuant to

---

* A copy of the complete text of CPLR 5225(b) appears in Appendix "A", infra.

the subject pledge, has a purely custodial and non-proprietary interest in the stock.

B. The Allegations of Clarkson's Petition

The petition of Clarkson, pursuant to which the subject proceeding was commenced, fails to allege either:

(a) that the judgment debtor (Shaheen) is entitled to the possession of the Pledged Stock; or

(b) that the judgment creditor (Clarkson) possesses rights in the Pledged Stock superior to those of MRFO, the pledgee of the Pledged Stock to whom it was transferred pursuant to the March 1977 pledge.

In fact, the only substantive allegation in Clarkson's petition is that "Martin Rubin, an attorney-at-law, has possession or custody of [the

Pledged Stock] belonging to the judgment debtor John M. Shaheen..."* There is simply no other substantive allegation in Clarkson's petition.

C. Petitioner's Motion Below to Dismiss the Petition for Failure to State a Claim upon which Relief Can Be Granted

On November 7, 1980, petitioner moved the District Court (S.D.N.Y.) (Richard Owen, J.) for an order, inter alia, pursuant to F.R.C.P. 12, dismissing the petition of Clarkson for failure to state a claim upon which relief could be granted.

The basis for the motion was that Clarkson had failed to make any factual allegation which would, if proven, have

* Clarkson's Petition, paragraph 9 thereof. Copies of the entire Petition and copies of the accompanying Order to Show Cause and supporting affidavit appear in Appendix "B", infra.

entitled it to relief under CPLR 5225(b). More particularly, it was argued that Clarkson failed to allege the basic jurisdictional fact that must be set forth in order to state a claim under CPLR 5225(b), to wit:

> that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee. (Emphasis added.)

As noted above, although Clarkson alleged that petitioner possessed legal title to the Pledged Stock, it absolutely failed to allege that he was entitled to possession thereof - such right to possession, it was argued, is the true jurisdictional test.

D. The District Court's Disposition of the Motion

On November 7, 1980, at a hearing before the District Court on another

matter, courtesy copies of the moving papers and Memorandum of Law were given to the District Court. The District Court immediately denied the subject motion to dismiss from the bench without even reading petitioner's papers in support of the motion. No papers had yet been submitted in opposition to the motion, and indeed, the motion was not even returnable until November 21, 1980. The District Court gave no reason for its denial of the motion except the following:

"THE COURT: --you know, for six years I have been on this bench looking at complaints where people move to dismiss them. I've looked at this complaint, this petition. I conclude that there is sufficient there to withstand a motion to dismiss. So that

motion is denied."*

By letter dated November 14, 1980, counsel for petitioner sought reconsideration of the District Court's decision. The District Court responded as follows:

> "I have again reviewed Clarkson's petition. It states a claim whether the possessory interest of Macmillan Ring-Free, asserted as a defense, is valid and enforceable under the circumstances of the pledge and Mr. Shaheen's ownership position in Macmillan are issues to be tried in the expedited hearing I have ordered. The application for reconsideration is therefore denied. So ordered, Richard Owen, U.S.D.J., 11/19/80."**

Quite clearly, the District Court's above noted response does not constitute a valid application of the

---

* Transcript of proceeding held before the District Court on November 7, 1980, p.30.

** A copy of the subject letter upon the face of which the District Court wrote its memorandum opinion appears in Appendix C, infra.

law. The Court clearly states that the petition states a claim because of what is asserted, by way of defense, in an answer to the petition. This finding turns a basic rule of law on its head; namely, that a pleading must be judged on its face and must contain allegations which, if proven, would support the entry of judgment as prayed for. No such allegations are made in Clarkson's petition.

E. Petitioner's Writ of Mandamus to the Court of Appeals for the Second Circuit

Subsequently, on December 1, 1980, petitioner applied to the Court of Appeals for the Second Circuit for a Writ of Mandamus directing the District Court to dismiss Clarkson's petition. The Second Circuit granted oral argument of the Mandamus petition, which

was held December 3, 1980. On December 4, 1980, the Second Circuit dismissed the Mandamus Petition without opinion.

The instant application follows.

REASONS FOR GRANTING THE WRIT

Petitioner John M. Shaheen respectfully submits that this petition should be granted because the Second Circuit has sanctioned judicial proceedings in the District Court which so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

More particularly, it is respectfully submitted that the Second Circuit permitted the District Court to grossly and unconstitutionally exceed its jurisdictional powers in per-

mitting Clarkson to proceed to discovery and trial on the basis of a pleading which lacks jurisdictionally requisite allegations. The allegations of the subject pleading would, even if proven, entitle Clarkson to no relief.

Finally, the pleading provides no constitutional due process notice to petitioner as to the actual claims which Clarkson intends to assert against him. That is to say, the District Court has permitted the subject proceeding to continue in violation of petitioner's basic due process rights to be confronted with the factual allegations against him.

ARGUMENT

I.

THE DISTRICT COURT HAS REFUSED TO ABIDE BY WELL SETTLED PRINCIPLES OF LAW

The law is clear beyond peradventure that a pleading must be judged on its face and that it must be dismissed as a matter of law if it fails to state a claim upon which relief may be granted.

It is equally clear that Clarkson's petition does not state a claim because it simply fails to state any cause of action against anyone. No factual allegations are asserted which, if proven, would entitle Clarkson to judgment.

The basic facts underlying Clarkson's Petition are set forth

above. Clarkson, in 1980, seeks the "turn-over" of stock which petitioner pledged to MRFO in 1977 to secure the repayment of a debt.

As is noted above, CPLR 5225(b), the statutory predicate for Clarkson's petition, requires that Clarkson plead and prove one of two factual assertions if it is to state a claim pursuant to CPLR 5225(b):

(a) that petitioner Sheheen is entitled to possession of the Pledged Stock; or

(b) that Clarkson possesses rights in the Pledged Stock superior to those of MRFO, the pledgee.

In other words, CPLR 5225(b) recognizes that Clarkson stands in the shoes of Shaheen and possesses no greater rights in property in which Sheheen has an interest than Shaheen himself possesses.

Neither of the required allegations is made by Clarkson.

Indeed, assuming arguendo the validity of the subject 1977 pledge, which Clarkson does not attack in its petition, the law is settled that:

(a) the judgment debtor, Shaheen, is not entitled to the possession of the Pledged Stock; and

(b) the third party pledgee, MRFO, has rights in the Pledged Stock superior to those of either Shaheen or Clarkson. Cohen v. First National City Bank, 49 Misc.2d 141, 267 N.Y.S.2d 146 (Civil Ct., N.Y.Co. 1966); Leumi Finance Corp. v. Sydler, et al., 60 Misc.2d 1021, 304 N.Y.S.2d 988 (Sup.Ct. Nassau Co. 1969).

Thus, in the absence of allegations attacking the subject pledge, it would be an impossibility for Clarkson to plead factual allegations sufficient to

state a claim under CPLR 5225(b).

However, Clarkson has made absolutely no factual allegation or factual showing, in his petition, that the subject pledge is in any way fraudulent or improper. Not has Clarkson set forth any other claim of actionable wrongdoing in connection with the subject pledge in its petition.

Thus, Clarkson has failed to state a claim in its supplementary proceeding petition pursuant to CPLR 5225 upon which relief can be granted. It has failed to allege the jurisdictional predicate upon which a CPLR 5225 claim must be based.

The fact that the escrowee of the Pledged Stock, Martin Rubin, holds the stock in a purely custodial capacity and lacks a proprietary interest therein is entirely irrelevant under

CPLR 5225(b). That is to say, the fact that the escrowee has a purely custodial interest in the stock does not mean that Shaheen has a possessory interest in the stock, which is the true jurisdictional test.

Thus, it is incontrovertable that the lower court has exceeded its jurisdictional powers in permitting Clarkson to proceed on the basis of a grossly defective petition.

Parenthetically, it is observed that one possible reason Clarkson failed to join MRFO, the pledgee of the Pledged Stock, and failed to attack the pledgee itself in its petition is that had it done so federal diversity jurisdiction might have been destroyed and Clarkson would have been forced to proceed in state court which, for its own reasons, it did not want to do. In

effect, it was attempting to "bootstrap" itself into federal court.

II.

THE SECOND CIRCUIT ERRED IN FAILING TO ISSUE A WRIT OF MANDAMUS

28 U.S.C. 1651 provides as follows:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

The law is settled that a Writ of Mandamus is proper to curb a lower court when it has exceeded its jurisdictional powers.

Thus, in Roche v. Evaporated Milk,

319 U.S. 21, 26 (1942), this Court stated as follows:

> "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction."

Likewise, in American Airlines v. Forman, 204 F.2d 230, 232 (3rd Cir. 1953), the Third Circuit indicated that mandamus is particularly proper where "the challenged assumption or denial of jurisdiction must be so plainly wrong as to indicate failure to comprehend or refusal to be guided by unambiguous provisions of a statute or settled common law doctrine".

It is submitted that the District Court below has engaged in an unauthorized exercise and usurpation of power which justifies the invocation

of an extraordinay remedy.

Finally, it is noted that this Court possesses power not only to grant certiorari to review the decision of the Second Circuit but also possesses plenary power, pursuant to 28 U.S.C. 1651, to directly issue a Writ of Mandamus to the District Court. Ex Parte Peru, 318 U.S. 578 (1943).

Petitioner proceeds herein by certiorari because, in any event, the decision of the Second Circuit must, in effect, be reviewed.

III.

MANDAMUS WAS REQUIRED BELOW BECAUSE THERE EXISTS NO OTHER MEANS TO PREVENT POSSIBLE IRREPARABLE INJURY

The denial of petitoner's motion to dismiss by the District Court below

is not appealable until merged in a final judgment.

It was and is the intention of the District Court to expedite discovery below and hold a trial the week of December 15-19, 1980.

Thus, the reason Mandamus was required below is that petitioner has a legitimate fear that the District Court may well persist in its refusal to grant him due process and may enter judgment against him directing the escrowee to turn over the Pledged Stock.

Should the District Court order the Pledged Stock "turned over", petitioner would have no basis upon which to stay such an order pending appeal in view of the fact that he is in no position to post a bond or otherwise deliver adequate security.

Thus, if petitioner were ordered to "turn over" the Pledged Stock to Clarkson, he would suffer irreparable injury which could not be vindicated or cured by a reversal on appeal. The Pledged Stock would already be gone.

CONCLUSION

Clarkson's Petition is jurisdictionally defective under CPLR 5225(b). Clarkson is required to allege facts establishing that Shaheen is entitled to possession of the subject stock in order to state a claim pursuant to CPLR 5225(b). It has absolutely failed to do so.

The District Court and the Second Circuit have sanctioned a gross violation of petitioner's basic due process rights in permitting Clarkson

to engage in discovery and proceed to trial on the basis of a jurisdictionally defective petition.

For the reasons stated above, a Writ of Certiorari should issue to review the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

Saxe, Bacon & Bolan, P.C.
Attorneys for Petitioner
John M. Shaheen
39 East 68th Street
New York, New York 10021
(212) 472-1400

Thomas A. Andrews
Howard F. Husum
Filip Tiffenberg
Of Counsel

SUPPLEMENTARY APPENDIX

ORDER OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT OF WHICH REVIEW IS SOUGHT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourth day of December, one thousand nine hundred and eighty.

In re John M. Shaheen,

Petitioner.

The Clarkson Company Limited, as trustee in bankruptcy,

Plaintiff,

v.

John M. Shaheen, Roy M. Furmark, et al.,

Defendants.

The Clarkson Company Limited,

Petitioner below,

v.

Martin Rubin and John M. Shaheen,

Respondents below.

Martin Rubin,

Interpleading Counter-Claiman below,

v.

Macmillan Ring-Free Oil Co., Inc., and The Sheriff of the City of New York, New York County Division,

Counterclaim Defendants below.

Upon oral argument and the papers submitted the petition of John M. Shaheen for a writ of mandamus is denied and the request for a stay pending determination of the petition is denied as moot.

S/
Hon. James L. Oakes, USCJ

S/
Hon. Thomas J. Meskill, USCJ

S/
Hon. Henry F. Werker, USDJ

APPENDIX

APPENDIX A

CIVIL PRACTICE LAW AND RULES SECTION 5225; PAYMENT OR DELIVERY OF PROPERTY OF JUDGMENT DEBTOR

(b) Property Not in the Possession of Judgment Debtor. Upon a special proceeding commenced by the judgment creditor, against a person in possession or custody of money or other personal property in which the judgment debtor has an interest, or against a person who is a transferee of money or otherpersonal property from the judgment debtor, where it is shown that the judgment debtor is entitled to thepossession of such property or that the judgment creditor's rights to the property are superior to those of the transferee, the court shall require such person to pay the money, or so much of it as is sufficient to

satisfy the judgment, to the judgment creditor, and if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff. Costs of the proceeding shall not be awarded against a person who did not disputethe judgment debtor's interest or right to possession. Notice of the proceeding shall also be served upon the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested. The court may permit the judgment debtor to intervene in the proceeding. The court may permit any adverse claimant to intervent in the proceeding and may determine his rights in accordance with section 5239.

(c) Documents to Effect Payment or Delivery. The court may order any person to execute and deliver any document necessary to effect payment or delivery. As amended L.1962, c.315, §5; L.1964, c.388,§25.

APPENDIX B

CLARKSON'S ORDER TO SHOW CAUSE, PETITION AND SUPPORTING AFFIDAVIT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE CLARKSON COMPANY LIMITED, as Trustee in Bankruptcy, appointed by the Supreme Court of the Province of Newfoundland, of the Property of Newfoundland Refining Company Limited and Provincial Refining Company Limited,

Plaintiff,

- against -

JOHN M. SHAHEEN, ROY M. FURMARK, ALBIN W. SMITH, PETER L. CARAS, PAUL W. RISHELL, SHAHEEN NATURAL RESOURCES COMPANY, INC., NEWFOUNDLAND REFINING COMPANY LTD., U.S.A., and FOUNDERS CORPORATION,

Defendants.

THE CLARKSON COMPANY LIMITED, As Trustee in Bankruptcy, appointed by the Supreme Court of the Province of Newfoundland, of the Property of Newfoundland Refining Company Limited and Provincial Refining Company

Limited,

Petitioner,

- against -

MARTIN RUBIN and JOHN M. SHAHEEN,

Respondents.

----------X

Index No. 76 Civ. 1373
(R.O.)

ORDER TO SHOW CAUSE

Upon the annexed petition and affidavit of Kevin D. Ashley and the exhibits thereto attached, it is

ORDERED that the respondents show cause at a motion term of this Court, to be held in Room 128, United States Court House, Foley Square, New York, New York on the 24th day of October, 1980 at 2:15 o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard why an order, pursuant to Rule 69(a), F.R.Civ.P.,

and CPLR 5225(b) and (c), should not be made herein:

(A) granting that judgment be entered against the respondent Martin Rubin requiring him to deliver to a receiver, if one is appointed by the Court on motion of The Clarkson Company Limited, or if none is appointed, to the Sheriff of the City of New York, New York County Division, all property in his possession or control in which John M. Shaheen has a proprietary interest including the following described property:

(1) 896,047 shares of stock of Can-Amera Export Refining Company Ltd.;

(2) 30,000 shares of preferred stock and 252,248 shares of common stock of SNR Holdings, Inc.;

(3) 100 shares of stock of Shaheen Natural Resources Co., Inc.;

(4) 207,343 shares of stock of

Founders Corporation;

(5) 1,371 shares of common stock and 142 shares of preferred stock of Macmillan Ring-Free Oil Co., Inc.; and

(6) 95 shares of stock of Alberta Export Refining Co., Ltd.

(B) directing respondents John M. Shaheen and Martin Rubin to execute and deliver any documents necessary to effect the delivery referred to in item A above; and

(c) granting such other relief as to the Court may seem just and proper, together with the costs and disbursements of this proceeding.

IT IS FURTHER ORDERED that personal service of a copy of this order and of the papers upon which the same is granted, on the said respondents on or before October 22, 1980 by 5:00 p.m. shall be sufficient service of this order.

Dated: October 21, 1980
N.Y.C., N.Y.

S/ Richard Owen
United States
District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE CLARKSON COMPANY
LIMITED, Etc.,

Plaintiff,

- against -

JOHN M. SHAHEEN, et al.,

Defendants.

THE CLARKSON COMPANY
LIMITED, Etc.,

Petitioner,

- against -

MARTIN RUBIN and JOHN
M. SHAHEEN,

Respondents.

(Same caption as shown
on pp. 4a and 5a)

Index No. 76 Civ. 1373
(R.O.)

PETITION TO COMPEL RESPONDENT
TO DELIVER PROPERTY IN WHICH
JUDGMENT DEBTOR HAS INTEREST

(CPLR 5225)

Petitioner, the Clarkson Company Limited ("Clarkson"), as Trustee in Bankruptcy, appointed by the Supreme Court of the Province of Newfoundland, of the property of Newfoundland Refining Company Limited and Provincial Refining Company Limited, states, by its attorneys, White & Case, for complaint against respondents:

1. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000.00).

2. Jurisdiction is conferred upon this Court by 28 U.S.C. §1332 by reason of the amount in controversy and the diversity of citizenship and by reason of the principle of ancillary jurisdiction.

3. Clarkson is a corporation

organized and existing under the laws of the Province of Ontario, Canada, where it maintains its principal place of business. Clarkson is licensed by the Superintendent of Bankruptcy of Canada to act as a Trustee in Bankruptcy in the Province of Newfoundland, as well as other Canadian jurisdictions.

4. Newfoundland Refining Company Limited ("NRC") is a corporation organized and existing under the laws of the Province of Newfoundland, Canada, with a registered office at 85 Elizabeth Avenue, St. John's, Province of Newfoundland. On March 12, 1976 NRC was adjudged bankrupt and Clarkson was appointed by the Supreme Court of the Province of Newfoundland as Trustee in Bankruptcy for the property of NRC.

5. Provincial Refining Company Limited ("PRC")is a corporation organized

and existing under the laws of the Province of Newfoundland, Canada, with a registered office at 85 Elizabeth Avenue, St. John's, Province of Newfoundland. On March 12, 1976 PRC was adjudged bankrupt and Clarkson was appointed by the Supreme Court of the Province of Newfoundland as Trustee in Bankruptcy for the property of PRC.

6. Title to all property of PRC and NRC vested in Clarkson as Trustee in Bankruptcy upon its appointment as trustee of the estates of PRC and NRC by the Supreme Court of the Province of Newfoundland.

7. Upon information and belief, the respondents Martin Rubin and John M. Shaheen are citizens of a State of the United States. Mrtin Rubin has a place of business at 122 East 42nd Street, New York, New York.

8. On July 22, 1980, Clarkson, as judgment creditor, recovered a judgment in this action against, among others, John M. Shaheen, judgment debtor, in the amount of $23,151,910, together with interest at the rate of six percent from March 13, 1976, and in the amount of $23,073,793, together with interest at the rate of six percent from July 1, 1980. The judgment is wholly unsatisfied and unpaid.

9. Respondent John M. Shaheen provided written answers to certain questions propounded by Clarkson in an information subpoena issued in this action pursuant to Rule 69(a), F.R. Civ.P., CPLR 5223 and CPLR 5224. From the described answers, it conclusively appears that the respondent Martin Rubin, an attorney-at-law, has possession or custody of property belonging to

the judgment debtor John M. Shaheen including the following specific property:

(1) 896,047 shares of stock of Can-Amera Export Refining Company Ltd.;

(2) 30,000 shares of preferred stock and 252,248 shares of common stock of SNR Holdings, Inc.;

(3) 100 shares of stock of Shaheen Natural Resources Co. Inc.;

(4) 207,343 shares of stock of Founders Corporation;

(5) 1,304 shares of stock of Macmillan Ring-Free Oil Co., Inc.; and

(6) 95 shares of stock of Alberta Export Refining Co., Ltd.

Counsel for respondent Martin Rubin has confirmed in a telephone conversation that Mr. Rubin is in possession of the above-described property as well as an additional 67 shares of common stock and

142 shares of preferred stock of Macmillan Ring-Free Oil Co., Inc., all of which belong to John M. Shaheen.

10. On September 11, 1980, Clarkson issued an execution on the property of John M. Shaheen to the Sheriff of the City of New York. On information and belief, the sheriff served upon the respondent an execution with notice of levy on September 19, 1980 and notice to garnishee on September 30, 1980. Pursuant to CPLR 5222, Clarkson caused a restraining notice to be served on the respondent on September 10, 1980 by certified mail, return receipt requested, and on September 25, 1980 by personal service.

WHEREFORE, the petitioner demands the following relief:

(A) a judgment be entered pursuant to Rule 69(a), F.R.Civ.P., and CPLR

5225(b) and (c) against the respondent Martin Rubin requiring him to deliver to a receiver, if one is appointed by the Court on motion of The Clarkson Company Limited, or if none is appointed, to the Sheriff of the City of New York, New York County Division, all property in his possession or control in which John M. Shaheen has a proprietary interest including the following described property:

(1) 896,047 shares of stock of Can-Amera Export Refining Company, Ltd.;

(2) 30,000 shares of preferred stock and 252,248 shares of common stock of SNR Holdings, Inc.;

(3) 100 shares of stock of Shaheen Natural Resources Co., Inc.;

(4) 207,343 shares of stock of

Founders Corporation;

(5) 1,371 shares of common stock of Macmillan Ring-Free Oil Co., Inc.;

(6) 95 shares of stock of Alberta Export Refining Co., Ltd.

(B) an order be entered directing the respondents John M. Shaheen and Martin Rubin to execute and deliver any documents necessary to effect the delivery referred to in item A above; and

(C) such other relief as to the Court may seem just and proper, together with the costs and disbursements of this proceeding.

WHITE & CASE
Attorneys for
Petitioner

By S/ Jeffrey
A Member of the Firm
14 Wall Street
New York, NY 10005

(212) 732-1040

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE CLARKSON COMPANY
LIMITED, Etc.,

Plaintiff,

- against -

JOHN M. SHAHEEN, et al.,

Defendants.

THE CLARKSON COMPANY
LIMITED, Etc.,

Petitioner,

- against -

MARTIN RUBIN and JOHN
M. SHAHEEN,

Respondents.

(Same caption as shown
on pp. 4a and 5a)

Index No. 76 Civ. 1373
(R.O.)

AFFIDAVIT TO COMPEL RESPONDENT TO DELIVER PROPERTY

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

KEVIN D. ASHLEY, being duly sworn, says:

1. I am associated with the firm of White & Case, attorneys for plaintiff, the Clarkson Company Limited ("Clarkson"), trustee in bankruptcy of Provincial Refining Company Limited ("PRC") and Newfoundland Refining Company Limited ("NRC"). I am familiar with the proceedings herein.

2. I make this affidavit in support of the petition of the plaintiff, pursuant to Rule 69(a), F.R.Civ. P., and CPLR 5225(b) and (c) for an order:

A. granting judgment be entered against the respondent Martin Rubin

requiring him to deliver to a receiver, if one is appointed by the Court on motion of The Clarkson Company Limited, or, if none is appointed, to the Sheriff of the City of New York, New York County Division, all property in his possession or control in which John M. Shaheen has a proprietary interest including the following described property:

1. 896,047 shares of stock of Can-Amera Export Refining Company Ltd.;

2. 30,000 shares of preferred stock and 252,248 shares of SNR Holdings, Inc.;

3. 100 shares of stock of Shaheen Natural Resources Co., Inc.

4. 207,343 shares of stock of Founders Corporation;

5. 1,371 shares of common stock and 142 shares of preferred stock of Macmillan Ring-Free Oil Co., Inc.; and

6. 96 shares of stock of Alberta Export Refining Co., Ltd.;

B. directing the respondents John M. Shaheen and Martin Rubin to execute and deliver any documents necessary to effect the delivery referred to in item A above; and

C. granting such other relief as to the court may seem just and proper, together with the costs and disbursements of this proceeding.

3. Jurisdiction for this special proceeding is based on the principle of ancillary jurisdiction and, as was the case in the main action, on diversity of citizenship. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000). Clarkson is not a citizen of any state of the United States. On information and

belief, the respondents John M. Shaheen and Martin Rubin are citizens of a state of the United States.

4. On July 22, 1980, Clarkson, as judgment creditor, recovered a judgment in this action against, among others, respondent John M. Shaheen, judgment debtor, in the amount of $23,151,910, together with interest at the rate of six percent from March 13, 1976, and in the amount of #23,073,793, together with interest at the rate of six percent from July 1, 1980. A copy of the judgment is attached hereto as Exhibit A. The judgment is wholly unsatisfied and unpaid.

5. On September 19, 1980, Clarkson received written answers of John M. Shaheen to an information subpoena dated August 1, 1980 issued in this action pursuant to Rule 69(a),

F.R.Civ.P., CPLR 5223 and CPLR 5224. Though the Court ordered on August 29, 1980 that all of the questions of the information subpoena to Mr. Shaheen be answered within twenty days, i.e., by September 18, 1980, the information subpoena answers were not signed. Copies of the relevant portions of such answers are attached hereto as Exhibit B. As indicated in the covering letter of Mr. Shaheen's former attorney, a sworn copy of Mr. Shaheen's answers was promised. It has not yet been received. Question 56 of the above information subpoena stated in relevant part:

> "List, describe and state the location and the market value of any stocks, securities, . . . or other forms of equity, debt, or commodity investment in which you now have and/or have had an interest."

Mr. Shaheen's answer to Question 56 states that the following shares of

stock are held by the respondent, Martin Rubin, Esq., 122 East 42nd Street, New York, N.Y. 10017:

1. 896,047 shares of stock of Can-Amera Export Refining Company Ltd.;

2. 30,000 shares of preferred stock and 252,248 shares of common stock of SNR Holdings, Inc.;

3. 100 shares of stock of Shaheen Natural Resources Co., Inc.;

4. 207,343 shares of stock of Founders Corporation;

5. 1,304 shares of stock of Macmillan Ring-Free Oil Co., Inc.; and

6. 95 shares of stock of Alberta Export Refining Co., Ltd.

The answer states that such shares are pledged under a Guaranty dated March 25, 1977, to Macmillan Ring-Free Oil Co., Inc., 90 Park Avenue, New York, New York 10016, which pledge is stated to be currently in effect, and identifies

Mr. Rubin as "Escrowee." The answer to Question 56 incorporates the answer to Question 130 which states in relevant part, "Do you own any corporations in part or wholly?" Mr. Shaheen's answer, in the form of an attached schedule, lists each of the corporations whose stock, listed above, is referred to in his answer to Question 56. It is clear from the above that John M. Shaheen is the owner of the shares in the possession of Martin Rubin and that Mr. Rubin's interest therein is purely custodial.

6. As his answer to Question 130 indicates, Mr. Shaheen owns the purported pledgee, Macmillan Ring-Free Oil Co., Inc. ("MRFO"). According to MRFO's Notice of Annual Meeting of Stockholders dated May 14, 1980, which was filed with the Securities

and Exchange Commission, pp. 1-7, attached hereto as Exhibit C, John M. Shaheen is the president and a control person of Macmillan Ring-Free Oil Co., Inc., owning, directly or beneficially, 41.9% of the common stock and 33.0% of the preferred stock of MRFO. The purported pledge, made at a time when John M. Shaheen was a defendant in this suit, appears to have been a device to retain control of the above described shares of stock while insulating them from Mr. Shaheen's creditors.

7. In a telephone conversation on October 17, 1980, Ronald Meister, Esq., of the firm of Kornstein, Meister & Veisz, attorneys for the respondent Martin Rubin, confirmed that Mr. Rubin is in possession of the above-described property as well as an additional 67 shares of common stock and 142 shares of

preferred stock of Macmillan Ring-Free Oil Col, Inc., all of which belong to John M. Shaheen.

8. On September 11, 1980, Clarkson issued an execution on the property of John M. Shaheen to the Sheriff of the City of New York, New York County Division. On information and belief, the sheriff served upon the respondent an execution with notice of levy on September 19, 1980 and a notice to garnishee on September 30, 1980. Pursuant to CPLR 5222, Clarkson caused a restraining notice to be served on the respondent Martin Rubin on September 10, 1980 by certified mail, return receipt requested, and on September 25, 1980 by personal service. Notwithstanding the above, Mr. Rubin has refused to deliver to the sheriff any of the property which he holds on

behalf of John M. Shaheen.

9. In a telephone conversation on October 17, 1980, Ronald Meister also informed me that Macmillan Ring-Free Oil Co., Inc. has instructed Mr. Rubin not to deliver Mr. Shaheen's stock to the sheriff and has notified him that, pursuant to a purported Guaranty Agreement, NRFO has given Mr. Shaheen 30 days from receipt of a letter of notice dated September 30, 1980 to cure a supposed breach of the said Agreement. The actions taken by MRFO appear to be part of a continuing attempt by the judgment debtor to retain control of the above described securities while placing them beyond the reach of the sheriff's levy. For this reason, Clarkson moves for an order in the form annexed requiring the respondent Martin Rubin to show cause why he

should not be required to deliver the above described securities to a receiver, if noe is appointed by the court on motion of Clarkson, or if none is appointed, to the Sheriff of the City of New York, New York County Division, and requiring the respondents to show cause why they should not be required to execute and deliver any documents necessary to effect the delivery.

10. No previous application for the relief sought herein has been made.

WHEREFORE, it is respectfully requested that the petition made by Clarkson be granted in all respects.

S/ Kevin D. Ashley
Kevin D. Ashley

Sworn to before me this
20 day of October, 1980
S/
Notary Public
NATHAN L. BORDEN
Notary Public, State of New York
No. 41-4677862
Qualified in Queens County

Certificate Filed in New York County
Commission Expires March 30, 1982

APPENDIX C

COUNSEL'S NOVEMBER 14, 1980 LETTER TO THE DISTRICT COURT, AND THE DISTRICT COURT"S MEMORANDUM OPINION

November 14, 1980

Honorable Richard Owen
United States District Judge
United States Courthouse
Room 2903
Foley Square
New York, New York 10007

Re: The Clarkson Company, Ltd. v. Martin Rubin and John M. Shaheen (Index No. 76 Civ. 1373)

Dear Judge Owen:

On November 7, 1980, Your Honor denied the motion of John M. Shaheen ("Shaheen") to dismiss the subject petition of The Clarkson Company, Ltd. ("Clarkson") from the bench without reading Mr. Shaheen's papers in support of the motion. There were no papers submitted in opposition, and indeed the motion was not even returnable until November 21, 1980. We respectfully

request that Your Honor reconsider that deicsion in view of the facts set forth hereinafter as well as in the moving papers.

The thrust of the relevant part of CPLR §5225 is that a judgment creditor may procure property in the hands of a third party only if it is alleged and proven that the judgment debtor himself is entitled to possession of that property. In other words, in order to state a claim upon which relief may be properly granted under CPLR §5225, Clarkson as judgment creditor must allege that Shaheen, judgment debtor, is entitled to possession of the subject stock.

Clarkson has failed to make the critical operative allegation required to state a cause of action. There exists then not even a speculative

basis upon which to conduct discovery, and it is utterly impossible to determine relevancy.

It is therefore respectfully requested that Your Honor reconsider the prior decision, and upon reconsideration, grant the subject motion to dismiss the petition or require that Clarkson allege substantive facts which would entitle it, if proven, to judgment.

Respectfully submitted,

SAXE, BACON & BOLAN, P.C.

Thomas A. Andrews

cc: WHITE & CASE
KORNSTEIN, MEISTER VEISZ
TRUBIN, SILLCOCKS, EDELMAN
& KNAPP

THE RESPONDING MEMORANDUM OPINION OF THE DISTRICT COURT WAS HANDWRITTEN ON THE FACE OF THE NOVEMBER 14, 1980 LETTER AND READS AS FOLLOWS:

"I have again reviewed Clarkson's petition. It states a claim whether the possessory interest of Macmillan Ring Free, asserted as a defense, is valid and enforceable under the circumstances of the pledge and Mr. Shaheen's ownership position in Macmillan are issues to be tried in the expedited hearing I have ordered. The application for reconsideration is therefore denied. So ordered, Richard Owen, U.S.D.J., 11/19/80."

No. 80-942

Supreme Court, U.S.
FILED
JAN 8 1981
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1980

JOHN M. SHAHEEN,

Petitioner,

against

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK (HONORABLE RICHARD OWEN, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK),

Respondent.

MEMORANDUM IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JEFFREY BARIST
Attorney for Respondent
The Clarkson Company Limited
14 Wall Street
New York, New York 10005

EDNA R. SUSSMAN
KEVIN D. ASHLEY
WHITE & CASE
Of Counsel

January 7, 1981

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1980

No. 80-942

JOHN M. SHAHEEN,

Petitioner,

-against-

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK (HONORABLE RICHARD OWEN, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK),

Respondent,

MEMORANDUM IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner seeks to have this Court grant its petition for a writ of certiorari on the ground that the District Court for the Southern District of New York denied petitioner's motion to

dismiss a pleading and that the Court of Appeals for the Second Circuit declined to issue a writ of mandamus reversing the District Court.

Denial of motions under Rule 12(b)6 are not reviewable by mandamus, a "drastic" remedy invoked only in "extraordinary situations . . . " Allied Chemical Corp. v. Daiflon, Inc., 101 S. Ct. 188, 190 (1980). Petitioner alleged a deficiency in the form of a petition for a turn-over order under New York state law. (See Petitioner's Appendix 9a-17a) The alleged deficiency was later cured. Ultimately, the purported pledgee, Macmillan Ring-Free Oil Company, Inc., who petitioner asserts should have been named in the initial pleading, was brought in and the claims of all parties were fully set forth in appropriate pleadings, including respondent's claim that the pledge was invalid and a fraudu-

lent conveyance. See Respondent's Appendix hereto and particularly RA26-RA27. Thus subsequent pleadings made petitioner's objection a technical one as to which pleading should have contained the allegations claimed to be requisite. Moreover, since the filing of the petition with this Court a trial was held. The parties have presented their proof and arguments to the District Court, which reserved decision. Any question presented by the petition is moot.

WHEREFORE, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Dated: New York, New York
January 7, 1981

Respectfully submitted,

JEFFREY BARIST
Attorney for Respondent
The Clarkson Company
Limited*
14 Wall Street
New York, New York 10005
(212) 732-1040

EDNA R. SUSSMAN
KEVIN D. ASHLEY

White & Case
Of Counsel

---

* All of the shares of The Clarkson Company Limited ("Clarkson") are owned by Clarkson Gordon, a partnership. Clarkson has no subsidiaries. Woods Gordon, a partnership, is the only affiliate of Clarkson.

APPENDIX

APPENDIX

TABLE OF CONTENTS

Answer [of John M. Shaheen].....RA1

Complaint and Counterclaim for Interpleader [of Martin Rubin].....RA5

Answer [of Macmillan Ring-Free Oil Co., Inc.] to the Interpleader Complaint of Martin Rubin.....RA15

Answer [of the Clarkson Company Limited] to the Cross Claim of Macmillan Ring-Free Oil Co., Inc.....RA23

[CAPTION OMITTED] ANSWER

The respondent, John M. Shaheen, by his attorney, Saxe, Bacon & Bolan, P.C., for his answer to the Petition, states the following:

1. Admitted.

2. Admits each and every allegation but denies that petitioner has standing to commence this action in New York.

3. Denies knowledge and information sufficient to form a belief.

4. Admitted.

5. Admitted.

6. Admitted to the extent that such an adjudication in bankruptcy occurred.

7. Admitted.

8. The Court's attention is respectfully directed to a copy of judgment annexed hereto as Exhibit "A" for its terms. Respondent denies knowledge and

information sufficient to form a belief as to whether any part of the judgment has been paid.

9. Admits upon information and belief that Martin Rubin is in possession of the shares of stock hereinafter listed, but denies that respondent, John M. Shaheen has a possessory interest in said stock.

10. Denies knowledge and information sufficient to form a belief.

AS AND FOR A FIRST SEPARATE AND DISTINCT DEFENSE

11. The complaint fails to state a claim upon which relief can be granted.

AS AND FOR A SECOND SEPARATE AND DISTINCT DEFENSE

12. The complaint fails to join all necessary parties.

AS AND FOR A THIRD SEPARATE AND DISTINCT DEFENSE

13. On or about March 29th, 1977, respondent, John M. Shaheen entered into

a written agreement guaranteeing certain debts owed to the Macmillan Ring-Free Oil Co., Inc. Those debts and the respective debtors are listed in the guarantee, a copy of which is annexed hereto as Exhibit "B".

14. Pursuant to said guarantee, John M. Shaheen secured payment of said debts by pledging and giving a security interest in certain shares of stock which he owned, to Macmillan. Said collateral was delivered to Martin Rubin, as escrowee.

15. Pursuant to the guarantee, John M. Shaheen has no present possessory interest in said stock.

AS AND FOR A FOURTH SEPARATE AND DISTINCT DEFENSE

16. Said debts were guaranteed by John M. Shaheen to ensure payment of legitimate business debts incurred by various companies and owed to Macmillan.

AS AND FOR A FIFTH SEPARATE AND DISTINCT DEFENSE

17. Petitioner is precluded from taking possession and control of the subject stock pursuant to Section 310 of the Communication Act of 1934.

WHEREFORE, the respondent demands judgment dismissing the Petition, together with the costs and disbursements of this proceeding.

DATED: New York, New York
October 24th, 1980

SAXE, BACON & BOLAN, P.C.
Attorneys for Respondent,
John M. Shaheen

By: /s/ Thomas A. Andrews
THOMAS A. ANDREWS
39 East 68th Street
New York, New York 10021
(212) 472-1400

[EXHIBITS OMITTED]

[CAPTION OMITTED]

COMPLAINT AND COUNTERCLAIM FOR INTERPLEADER

Respondent-counterclaimant Martin Rubin ("Rubin"), by his attorneys, Kornstein Meister & Veisz, complains and counterclaims for interpleader as follows:

1. Rubin is a member of the Bar of this Court and a citizen of the State of New York, residing at 85 Dorchester Road, Rockville Centre, New York.

2. Counterclaim defendant Macmillan Ring-Free Oil Co., Inc. ("Macmillan") is a Delaware corporation with its headquarters and principal place of business located at 90 Park Avenue, New York, New York.

3. Counterclaim defendant the Sheriff of the City of New York, New York County Division ("Sheriff"), is a citizen of the state of New York.

4. Petitioner, The Clarkson Company Limited ("Clarkson"), as Trustee in Bankruptcy, appointed by the Supreme Court of the Province of Newfoundland, of the Property of Newfoundland Refining Company Limited and Provincial Refining Company Limited, is a corporation organized and existing under the laws of the Province of Ontario, Canada, where it maintains its principal place of business.

5. This is a complaint and counterclaim for interpleader or in the nature of interpleader brought pursuant to the provisions of 28 U.S.C. §1335.

6. This Court has jurisdiction over the subject matter of this complaint and

counterclaim by virtue of the principles of pendent and ancillary jurisdiction and by virtue of the diversity of citizenship of adverse claimants to securities held by Martin Rubin as escrowee, as hereinafter set forth.

The Guaranty Agreement

7. On March 29, 1977, John M. Shaheen ("Shaheen"), a defendant and respondent in this action, entered into a guaranty agreement with counterclaim defendant Macmillan. A copy of that agreement (the "guaranty agreement") is annexed as Exhibit A to the affidavit of Martin Rubin (the "Rubin affidavit") sworn to October 24, 1980 and previously submitted in this action.

8. Pursuant to the guaranty agreement, Shaheen guaranteed the indebtedness of certain companies to Macmillan. To

secure payment of the companies' obligations, Shaheen "deposited, pledged, [gave] a security interest in and delivered to Macmillan" certain properties to be held by an escrowee. The escrowee's obligations under the guaranty agreement were solely the following:

> (1) Upon receipt of written notice from Macmillan that Macmillan has given Guarantor [Shaheen] the thirty (30) days' written notice specified in A above and Guarantor has failed to cure within such period as specified therein or upon receipt of written notice from Macmillan that Guarantor is in default under B above, Escrowee shall on seven days' written notice by Certified Mail to Guarantor at the address designated with the signature below release and deliver the Collateral to Macmillan.
>
> (2) Upon receipt of written notice from Guarantor that the Indebtedness has been paid in full, Escrowee shall on seven (7) days' written notice by Certified Mail to Macmillan release and deliver the Collateral to Guarantor.

9. Rubin was appointed escrowee under the guaranty agreement.

10. At the time Rubin agreed to serve as escrowee, he was not informed, and he did not know, that Shaheen was a defendant in this action. He did not become aware of that fact until he was served with papers in this proceeding.

11. Rubin presently holds, pursuant to the guaranty agreement, the following securities (the "Securities"):

100 common shares	Shaheen Natural Resources Company Inc.
207,343 common shares	Founders Corporation
896,047 common shares	Can-Amera Export Refining Co., Ltd.
1,304 common shares	Macmillan Ring-Free Oil Co., Inc.
30,000 preferred shares	SNR Holdings, Inc.
252,248 common shares	SNR Holdings, Inc.
95 common shares	Alberta Export Refining Co. Ltd.

67 common shares	Macmillan Ring-Free Oil Co. Inc.
142 preferred shares	Macmillan Ring-Free Oil Co. Inc.

The Claim of Clarkson Company Limited and the Sheriff of the City of New York

12. The first Rubin learned of any dispute about the ownership of the Securities was on September 12 of this year when he was served with a restraining notice signed by White & Case on behalf of Clarkson. The notice directed Rubin not to transfer or to permit interference with any property of Shaheen except as provided in Section 5222 of the New York Civil Practice Law and Rules. A copy of that restraining notice is annexed as Exhibit B to the Rubin affidavit.

13. On September 18, 1980, Rubin was served with a levy and Execution with Notice to Garnishee, signed by the

Sheriff, again obtained by Clarkson, directing him to transfer to the Sheriff personal property in which Shaheen has an interest. Copies of that levy and Execution with Notice are annexed as Exhibit C to the Rubin affidavit.

The Claim of Macmillan Ring-Free Oil Co.

14. On or about October 2, 1980, Rubin received a letter from John Trubin of the firm of Trubin Sillcocks Edelman & Knapp. Mr. Trubin stated his firm represents Macmillan and said that:

> "Recently we received notice that you have been served with an attachment and notice of levy in an action entitled The Clarkson Company, Ltd. et al. v. John M. Shaheen, et al. with respect to property belonging to Mr. Shaheen. Macmillan's security interest in the stock collateral you are holding is prior in time and senior to any such attachment or levy. Macmillan therefore instructs you not to turn over the stock collateral to the sheriff or any other third party.

A copy of Mr. Trubin's letter is annexed as Exhibit D to the Rubin affidavit.

15. On October 24, Rubin received a second letter from the Trubin firm. It informed him that if he released the Securities to a receiver, the Sheriff or any other party, Macmillan would hold him personally liable for that release. A copy of that letter is annexed as Exhibit E to the Rubin affidavit.

Rubin's Position as Stakeholder

16. Rubin has no personal stake in the outcome of the dispute between the claimants. His sole interest in the escrowed securities is his claim for the charges, legal fees, disbursements and other costs of this action.

17. By virtue of the conflicting claims described in paragraphs 12 through 15 of this counterclaim, Rubin is in

great doubt as to which party is entitled to the Securities.

18. Rubin is in a dangerous and doubtful position and cannot safely determine to whom he is required to pay or deliver the Securities. Rubin therefore may be exposed to multiple suits and multiple liability.

WHEREFORE Rubin prays that this court:

(1) Permit Rubin to pay and deliver into this Court the Securities he holds in escrow, pending the outcome of this proceeding;

(2) Require counterclaim defendants Macmillan and the Sheriff to interplead and set up their claims to the Securities;

(3) Adjudge the respective claims of Clarkson, Macmillan and the Sheriff to the property at issue;

(4) Discharge and relieve Rubin from all liability in the premises;

(5) Restrain Clarkson, Macmillan and the Sheriff from instituting or prosecuting any proceeding against Rubin affecting the

Securities other than this interpleader action;

(6) Award Rubin his costs, including legal fees, disbursements and other proper charges against the parties; and

(7) Grant such other and further relief as to this Court seems just and proper.

KORNSTEIN MEISTER & VEISZ
Attorneys for Respondent-Interpleading Counter-claimant Martin Rubin

By /s/ Ronald W. Meister
Ronald W. Meister
405 Lexington Avenue
New York, New York 10174
(212) 599-2700

October 30, 1980

[CAPTION OMITTED]

ANSWER TO THE INTERPLEADER COMPLAINT OF MARTIN RUBIN

Counterclaim defendant, Macmillan Ring-Free Oil Co., Inc. ("Macmillan"), by its attorneys Trubin Sillcocks Edelman & Knapp as and for its answer to the interpleader complaint alleges as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 1, 4, 10, 11, 12, 13, 17 and 18 of the interpleader complaint.

2. Admits the allegations of paragraphs 2, 3, 4, 5, 6, 7, 9, 14, 15 and 16 of the interpleader complaint.

3. Denies each and every allegation of paragraph 8 of the interpleader complaint except admits that John M. Shaheen ("Shaheen") entered into a Guaranty Agreement to guarantee the indebtedness of certain companies to Macmillan and

that to secure payment of the companies' obligations Shaheen "deposed, pledged, [gave] a security interest in and delivered to Macmillan" certain properties to be held by an escrowee and that the escrowee's obligations are those provided for under the Guaranty Agreement.

4. Admits on information and belief the truth of the allegations of paragraph 11 of the interpleader complaint.

COUNTERCLAIM AGAINST MARTIN RUBIN AND CROSS CLAIMS AGAINST THE CLARKSON COMPANY LIMITED, JOHN M. SHAHEEN, AND THE SHERIFF OF THE CITY OF NEW YORK, NEW YORK COUNTY DIVISION

5. Upon information and belief, on July 22, 1980, The Clarkson Company Limited ("Clarkson") as Trustee in Bankruptcy, appointed by the Supreme Court of the Province of Newfoundland, of the property of Newfoundland Refining Company Limited and Provincial Refining Company Limited, as plaintiff, recovered a judgment in an action in Federal District

Court in the Southern District of New York against John M. Shaheen, as defendant for the sum of $23,151,915.00, together with interest at the rate of six percent from March 13, 1976 and for the sum of $23,073,793.00, together with interest at the rate of six percent from July 1, 1980 (the "Judgment").

6. Upon information and belief, on September 11, 1980 Clarkson issued an execution on the property of John M. Shaheen to the Sheriff of the City of New York.

7. Upon information and belief, the Sheriff served respondent Martin Rubin ("Rubin") with a restraining notice and notice of levy on or about September 10, 1980.

8. Upon information and belief, respondent Martin Rubin holds the following shares of stock ("the Stock") which belong to Macmillan:

(1) 896,047 shares of stock of Can-Amera Export Refining Company Ltd.;

(2) 30,000 shares of preferred stock and 252,248 shares of common stock of SNR Holdings, Inc.;

(3) 100 shares of stock of Shaheen Natural Resources Co., Inc.;

(4) 207,343 shares of stock of Founders Corporation;

(5) 1,513 shares of stock of Macmillan Ring-Free Oil Co., Inc.;

(6) 95 shares of stock of Alberta Export Refining Co., Ltd.

9. Rubin is holding the Stock as escrow agent under a Guaranty agreement dated March 29, 1977. Under the Guaranty Agreement the Stock is collateral for loans made by Macmillan which are guaranteed by Shaheen.

10. The present amount of the indebtedness guaranteed by Shaheen and

secured by the Stock is $6,018,932.00 and upon information and belief exceeds the value of the Stock.

11. Macmillan's security interest in the Stock is prior in time and senior to any interest of Clarkson and the Sheriff of the City of New York.

12. On or about September 30, 1980 Macmillan notified Shaheen pursuant to the terms of the Guaranty Agreement that he was in breach of the Guaranty Agreement and had 30 days from receipt of this notice to cure the breach.

13. More than 30 days have passed since Macmillan's notice to Shaheen of his breach of the Guaranty Agreement and Shaheen has failed to cure the breach.

14. By letter dated November 13, 1980 Macmillan notified Rubin that more than 30 days had elapsed since Shaheen's breach under the Guaranty Agreement and that the breach had not been cured and

that Macmillan was as a result under the terms of the Guaranty Agreement, entitled to possession of the collateral 7 days after receipt of this notice by Rubin.

15. Pursuant to the terms of the Guaranty Agreement Macmillan is entitled to possession of the Stock and entitled to apply it towards the indebtedness guaranteed by Shaheen.

WHEREFORE, counterclaim defendant Macmillan demands that a judgment be entered against Rubin, Clarkson, Shaheen and the Sheriff of the City of New York pursuant to CPLR 5239 determining:

1. That the Stock is collateral validly pledged to Macmillan in which Macmillan has a prior and senior interest to Clarkson;

2. That the Stock cannot be applied to the satisfaction of the judgment obtained by Clarkson;

3. Releasing the Stock from the levy of the Sheriff;

4. Holding that Macmillan is entitled to immediate possession of the Stock and to apply the Stock towards the indebtedness guaranteed by Shaheen;

5. Awarding Macmillan its costs and disbursements in this action; and

6. Granting such other and further relief as to this Court seems just and proper.

Dated: New York, New York
November 19, 1980

TRUBIN SILLCOCKS EDELMAN
& KNAPP

By /s/Roger Crane, Jr.
For the Firm
Attorneys for Counterclaim
Defendant Macmillan
Ring-Free Oil Co., Inc.
Office & P.O. Address
375 Park Avenue
New York, New York 10152
(212) 759-5400

Counterclaim defendant Macmillan demands trial by jury of all the issues in this proceeding.

TRUBIN SILLCOCKS EDELMAN
& KNAPP

By /s/Roger Crane, Jr.
For the Firm
Attorneys for Counterclaim
Defendant Macmillan
Ring-Free Oil Co., Inc.
Office & P.O. Address
375 Park Avenue
New York, New York 10152
(212) 759-5400

[CAPTION OMITTED]

ANSWER TO THE CROSS CLAIM OF MACMILLAN RING-FREE OIL CO., INC.

Petitioner, The Clarkson Company Limited ("Clarkson"), as Trustee in Bankruptcy, appointed by the Supreme Court of the Province of Newfoundland, of the Property of Newfoundland Refining Company Limited and Provincial Refining Company Limited, by its attorneys, White & Case, as and for its answer to the cross claim of Macmillan Ring-Free Oil Co., Inc. ("Macmillan") alleges as follows:

1. Admits the allegations of paragraph 5 that on July 22, 1980, a judgment was entered in the Federal District Court in the Southern District of New York in favor of the Clarkson Company Limited ("Clarkson") as Trustee in Bankruptcy, appointed by the Supreme Court of the

Province of Newfoundland, of the property of Newfoundland Refining Company Limited and Provincial Refining Company Limited, as plaintiff, and against John M. Shaheen, as defendant, for the sum of $23,151,915.00, together with interest at the rate of six percent from March 13, 1976 and for the sum of $23,073,793.00, together with interest at the rate of six percent from July 1, 1980 ("the Judgment").

2. Admits the allegations of paragraph 6.

3. Denies the allegations of paragraph 7 but admits that Clarkson caused a restraining notice to be served on respondent Martin Rubin on September 10, 1980 and admits, on information and belief, that the sheriff served a notice of levy on the respondent Martin Rubin on September 19, 1980.

4. Admits on information and belief the allegation of paragraph 8 that the shares of stock are in the possession of Martin Rubin but denies that the shares of stock belong to Macmillan.

5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 9, 10, 12, 13 and 14.

6. Denies the allegations of paragraphs 11 and 15.

COUNTERCLAIM AGAINST
MACMILLAN RING-FREE OIL CO., INC.

1. Petitioner repeats and realleges the allegations contained in paragraphs 1 through 10 of its Petition filed October 23, 1980 (the "Petition") with the same force and effect as if fully set forth at length herein.

2. Clarkson commenced the main action herein in which it obtained the Judgment against John M. Shaheen by personal

service of a summons and complaint on John M. Shaheen on or about March 23, 1976. At all times subsequent thereto John M. Shaheen has been a defendant in said action and/or the Judgment has been docketed against him.

3. On information and belief, Macmillan's claim to the assets of John M. Shaheen held by Martin Rubin is based on the claim that John M. Shaheen purportedly entered into a Guaranty dated March 29, 1977 ("Guaranty dated March 29, 1977") by which he allegedly conveyed to Macmillan an interest in the property described in paragraph 9 of the Petition which, on information and belief, now is in the possession of Martin Rubin.

4. The purported conveyance, if any, by John M. Shaheen of an interest in the property described in paragraph 9 of the Petition was made with intent to delay, hinder or defraud creditors; without fair

consideration; at a time when John M. Shaheen was insolvent or thereby rendered insolvent, when he intended to, and/or believed that he would, incur debts beyond his ability to pay as they mature and when he was a defendant in this action. Macmillan did not give fair consideration for such purported conveyance and knew at the time of the purported conveyance that it was made in fraud of creditors.

5. The purported conveyance, if any, by John M. Shaheen of an interest in the property described in paragraph 9 of the Petition was made in fraud of creditors.

6. Clarkson's rights to the property described in paragraph 9 of the Petition are superior to the rights of Macmillan, if any, to such property, and any rights of Macmillan must be subordinated by this court of equity to the rights of Clarkson.

WHEREFORE, the petitioner demands the following relief:

(A) a judgment be entered pursuant to Rule 69(a), F.R.Civ.P., and CPLR 5225(b) and (c) against the respondents Martin Rubin and John M. Shaheen and against counterclaim defendant Macmillan Ring-Free Oil Co., Inc. requiring Martin Rubin to deliver to a receiver, if one is appointed by the Court on motion of The Clarkson Company Limited, or if none is appointed, to the Sheriff of the City of New York, New York County Division, all property in his possession or control in which John M. Shaheen has a proprietary interest including the following described property:

(1) 896,047 shares of stock of Can-Amera Export Refining Company, Ltd.;

(2) 30,000 shares of preferred stock and 252,248 shares of common stock of SNR Holdings, Inc.,;

(3) 100 shares of stock of Shaheen Natural Resources Co., Inc.;

(4) 207,343 shares of stock of Founders Corporation;

(5) 1,371 shares of common stock and 142 shares of preferred stock of Macmillan Ring-Free Oil Co., Inc.;

(6) 95 shares of stock of Alberta Export Refining Co., Ltd;

(B) a judgment be entered setting aside and annulling the Guaranty dated March 29, 1977 and the purported conveyance to Macmillan Ring-Free Oil Co., Inc., of an interest in any of the property described in Item A above;

(C) a judgment be entered pursuant to Rule 69(a), F.R.Civ.P., and CPLR 5225(b) and (c) against counterclaim

defendant Macmillan Ring-Free Oil Co., Inc., determining that the right of The Clarkson Company Limited to the property described in Item A above is superior to that of Macmillan Ring-Free Oil Co., Inc.;

(D) an order be entered directing the respondents John M. Shaheen and Martin Rubin and counterclaim defendant Macmillan Ring-Free Oil Co., Inc. to execute and deliver any documents necessary to effect the delivery referred to in item A above; and

(E) such other relief as to the court may seem just and proper, together with the costs and disbursements of this proceeding.

Dated: New York, New York
November 26, 1980

WHITE & CASE

By Jeffrey Barist
A Member of the Firm

Attorneys for Petitioner The
Clarkson Company Limited as
Trustee In Bankruptcy of the
Property of Newfoundland
Refining Company Limited and
Provincial Refining Company
Limited
14 Wall Street
New York, New York 10005
(212) 732-1040